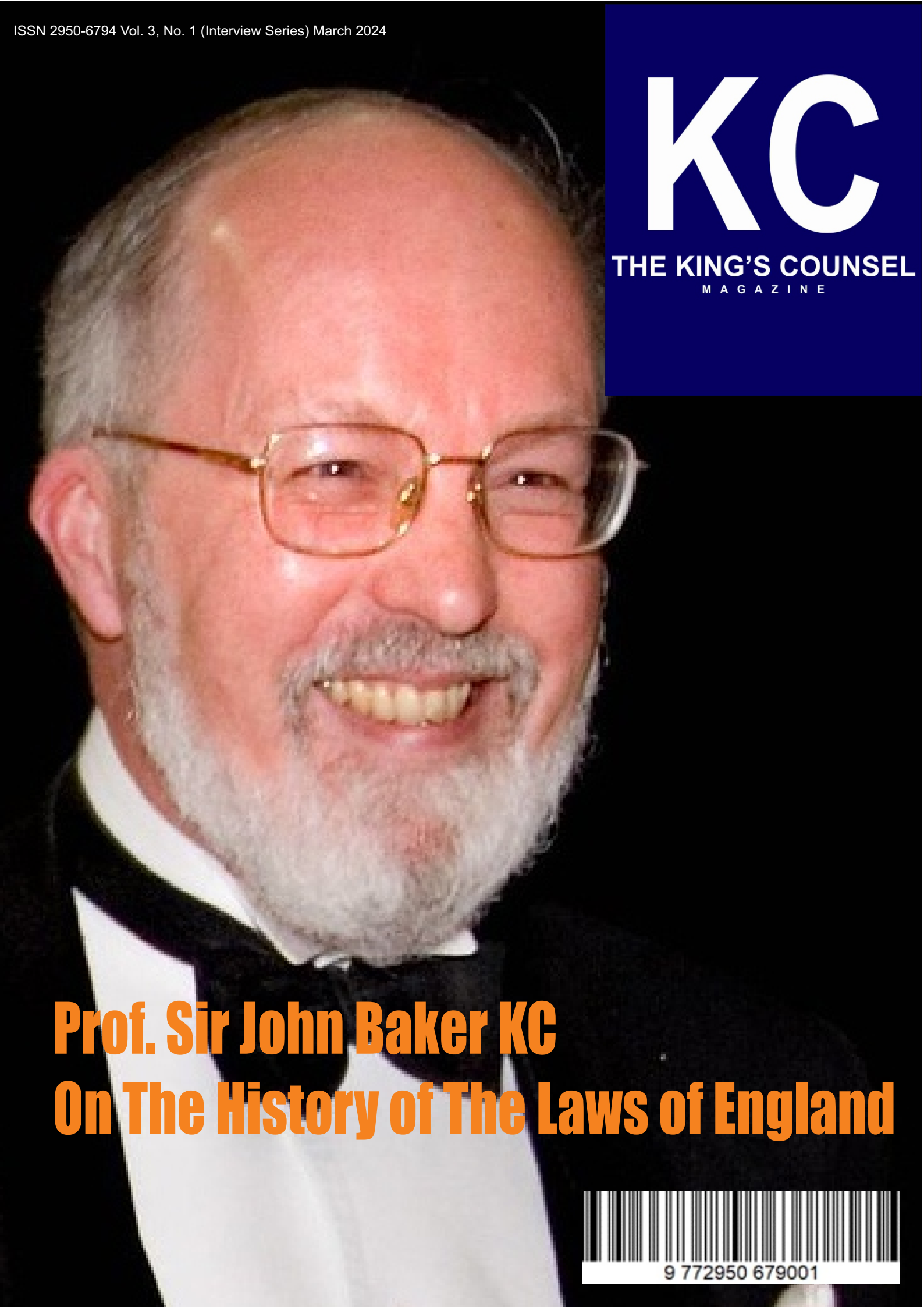
ISSN 2950-6794 Vol. 3, No. 1 (Interview Series) March 2024

KC

THE KING'S COUNSEL

MAGAZINE



Prof. Sir John Baker KC
On The History of The Laws of England

9 772950 679001

INTERVIEW
PROF. SIR JOHN BAKER KC
On the History of the Laws of England

Prof Sir Baker was educated at University College London (LLB 1965, PhD 1968). He was called to the bar by the Inner Temple (1966) and taught law at University College London (1965-70) and Cambridge University (1970-2011). He was appointed Professor of English Legal History, Cambridge (1988-98), Downing Professor of the Laws of England (1998-2011), Fellow of St Catharine's College, Cambridge (1971-) and University College London (1991-); LLD, Cambridge (1984); Fellow of the British Academy (1984) and Honorary Foreign Member of the American Academy (2001); Honorary LLD, Chicago (1992); Honorary Bencher of the Inner Temple and Gray's Inn; Queen's Counsel honoris causa (1996); knighted for services to legal history (2003); Literary Director of the Selden Society (1981-2011); author of *An Introduction to English Legal History* (1971; 5th edition, 2019), *The Reinvention of Magna Carta 1216-1616* (2017); *English Law under Two Elizabeths* (2021), and numerous other books and papers.

The AAL Magazine: What a great pleasure and honor it is to interview such a distinguished Downing Professor Emeritus of the Laws of England at the University of Cambridge where you have excelled in research on the History of Laws of England. Professor, I have had the benefit of reading your profile which gives details of a serious of books and volumes you have published. I think your contribution to the history of the Laws of England is so immense and I really could not understand the amount of time you must have invested in gleaning all the information produced therein. You have delved deep into the history of England the development of law in such a background where searching historical materials are extremely difficult and it is indeed a huge exercise in research. You have been amply rewarded with a number of high academic credentials and honorary doctorates by Universities in recognition and in honor of the research you had undertaken. If I may begin this interview, could you explain to us as to what this 'Downing Professor' denotes?

Prof. Baker: It is the name of the first chair of English law established in the University of Cambridge. It was originally part of the foundation of Downing College, named after Sir George Downing (d. 1749).

The AAL Magazine: It is not clear as to what constitute the 'Laws of England' and the 'English Common Law'. Of course Common Law is the Judge made law, my issue is whether there could be some elements of judge made law having been codified and the Laws of England having been introduced by the Parliament. Could there be some intermingling of both. Judge made law could not possibly have been derived without reference to the political and social setting at the time the Judge expounded the law unlike in the U.S where the law is expounded with reference to what framers had in mind

at the time the constitution was drafted. Would you elaborate on the research that you have undertaken especially in the context of the social settings.

Prof. Baker: As you say, the laws of England consist of both statute law and unwritten common law. The position is similar in the United States, save that the Supreme Court has assumed the power to strike down legislation which it considers to infringe the written constitution. Exercising that judicial power to review legislation creates a different kind of judge-made law, though I think it is a matter of controversy whether it should be tied to the original intent or whether it can evolve like the common law. If they followed the original intent, they would still have slavery. In the United Kingdom we do not have a written constitution and therefore Parliament is supreme. Acts of a legislature obviously respond directly to social changes and political pressures. But the relationship between the common law and social change is more complex than one might think. The common law does have to adapt as the world changes, but the judges cannot simply overturn long-standing principles derived from centuries of argument and reasoned thinking. It is therefore a slower process, moving step by step from an agreed starting point – and it may sometimes be so gradual that Parliament feels it necessary to take over. One thing the judges are not free to do is to impose taxation, and this means that they cannot by developing the common law bring about the kind of social reforms which require monetary expenditure or which require the balancing of interests which are not represented before them in particular litigation. Even setting up enquiries to consider reforms costs money.

The AAL Magazine: If I may ask you Professor, you have started the Volume I from the Canon Law and Ecclesiastical Jurisdiction from the fifth century to sixteenth century. I would say it is a fairly long period - almost a millennium. Would you expatiate upon on the nature of research that must have influenced this volume? England was governed by Roman Empire up until fourth Century surely there must have been some sort of a clash of Papal influence of Roman law and the adopting of Latin legal maxims. The first volume also covered the period between the emergence of Protestant movement in England and Europe ending Sixteenth Century.

Prof. Baker: the Oxford History of the Laws of England is a series of volumes written by different authors. I am the general editor but have only written one of the volumes myself – Volume VI (1483-1558). Volume I was written by Professor Helmholz. But I can respond to your question by saying that the Christian Church probably did not reach England until after the Romans had left. There was therefore no Roman law operating in England which could have influenced the law of the Church when it was received here. That influence came through the universities, starting with Bologna, where doctors trained in Roman law reduced the rules and regulations of the Church into some kind of system. I don't think this could be called a clash – the two systems of law went hand in hand. If there was a clash it was with the English common law, which was developed by lawyers practising in the king's courts. Until the nineteenth century those lawyers belonged to a completely separate profession from the doctors of law who practised in the Church courts.

The AAL Magazine: Was there a social phenomenon that changed the style of governance and enactment of laws which were pro Roman Government and the defiance of Roman law under Protestant movement after the 15th Century. Was there any deliberate move to defy the Roman laws enacted during Roman influence in England?

Prof. Baker: As I said in my last answer, the Roman law did not operate in England after the Romans left – which was many centuries before the common law came into being. I think your question relates more to the law of the Church. In England, the Church's jurisdiction was primarily concerned with marriage, wills, intestate succession to movables, and the punishment of lesser sins. Land law, contract, tort, and the punishment of more serious crimes belonged to the king's courts of common law. The break with Rome in the sixteenth century had virtually no effect on the jurisdiction of the Church courts, since the law of marriage, wills and succession remained the same. It was more about theology, and whether it was right to burn people alive for failing to believe in the theories of theologians.

The AAL Magazine: Your Co-Editor John Hudson, has delved into translations and quotes extensively from the original sources which were previously only available in Latin, Old English and Old French, and he has opened the source for a wider range of readers. Professor, how were these sources referred to and where were you able to source them. I know England has a corpus of literature from the early times and they are well preserved by the Archivists. The Church of England Archives Oxford University Archives are yet another source of ancient archival repositories. Would you advise as to how these sources were accessed to as I feel a future researcher might find it interesting. Where do you consider being the place from which you got 'a wealth of information'? To which library do you attribute being the greatest repository of the English law history?

Prof. Baker: As I indicated in a previous answer, John Hudson was the author of the second volume in the Oxford series, not a co-editor. He had to use a wide range of original sources, because much of his period predated the keeping of records by courts. For the later periods on which I have written myself, we have a continuous record – written in Latin on parchment – of every case heard in the central royal courts from the 1190s onwards, and an increasing range of records of cases heard in other courts, not to mention a professional literature and more plentiful extra-legal sources. The Church itself has few if any records of this kind – indeed, the Church of England as such does not have a relevant archive. The principal records are in the Public Record Office at Kew (near London), and most of the court-records which are kept there can now be read in digital photographs – at any rate, by those who can read abbreviated Latin written in 'court hand' – via the website called Anglo-American Legal Tradition (http://aalt.law.uh.edu/). This is a resource of immense value, created by the energy and dedication of Professor Robert Palmer of the University of Texas at Austin and a team of helpers. Besides the records kept by courts, there are the law reports and other materials written by lawyers. These have survived in libraries all over the world. The largest collection of legal manuscripts (other than records) is in the British Library,

London, followed by Cambridge University Library and the Harvard Law School. Many important texts, including medieval and early-modern law reports, have been edited by the Selden Society, with parallel English translations of the Law French and Latin. Printed law books from the fifteenth century onwards can be read via the website Early English Books Online. But the full range of available material is very large, including for later periods treatises, lectures, opinions of counsel, lawyers' correspondence, family muniments, and so on. We can also sometimes derive insights from lay literature and polemical tracts.

The AAL Magazine: We would like to know how the English law has evolved over a long period time and what were the core elements of English law, that was subjected to change over such a long period of time. Was it the rationality and reasoning on which the British judicial system was grounded or could there be any other reason which you have discovered during your research.

Prof. Baker: That is rather a large question to answer in a nutshell, though I have suggested the outlines of an answer already. Statutes come from Parliament after political debate and, being written, lack the flexibility of the common law. The judges cannot rewrite statutes to make them more sensible or rational, but they do have to interpret them and their decisions as to what statutes mean form a kind of case-law which is different from the common law. The development of the common law itself is quite different, since it takes place over the long term as a result of argument in court by lawyers putting opposing points of view, and reasoned responses to those arguments by judges and appellate courts. Every new step has to be justified in terms of previous reasoning, though it is sometimes possible to correct what seem to be errors in previous conclusions or to introduce countervailing reasons which were not considered in previous cases. In many respects the methodology of the common law is superior to that of parliamentary statutes, though the latter necessarily take precedence and can extinguish common law. Legislation is necessary to bring about changes which courts are not permitted to bring about, especially those which require public funds to be made available. Nowadays we live in a regulatory state and so most of the law is contained in statutes and statutory instruments, though most of it is quite unknown to ordinary persons (or even to lawyers) and does not directly concern them. In late medieval times, most of the law was common law, found not only in reported cases but also in the teaching of the inns of court. The earliest statutes were brief and broadly worded and also had to be expounded by courts and in the inns of court. However, the development of the common law by reasoning from case to case has followed much the same pattern over a great many centuries. What has changed is not so much the fundamental character of the common law as the world on which it operates.

The AAL Magazine: Professor, I would be curious to know how Normans, who spoke French, had enjoyed customary law in Normandy, there does not seem to exist any evidence of any professional lawyers or judges or any judicial system existed in Normandy. The clergy was hugely influenced by the Roman law and the Canon Law of the Christian Church. How was the reception of

Norman influence in developing the English law? What impact did it have on the development of English law principles? Do you think this is a new area for further research?

Prof. Baker: How far the Norman 'conquest' of England in 1066 altered English law was a topic of heated controversy in the time of Elizabeth I and it is still being argued about in the time of Elizabeth II. The Normans themselves were keen to emphasise legal continuity from before 1066, since they claimed England by right rather than by conquest; but they did in fact introduce significant changes in the patterns of landholding. Their innovations were not a matter of transplanting jurisprudence but a reflection of military feudalism, which was to some extent a form of social organisation imposed from above. But they had to be blended with what was there before. You are right that there were no professional lawyers in Normandy in 1066, any more than there were in England. And there were variable customs rather than a body of law like the common law. We usually consider the common law to have come into being during the twelfth century, not as a direct result of the Norman invasion but as a result of the strengthening of central institutions. You cannot have a 'common' law – that is, a law common to the whole country, until you have a legislature and a legal system exercising a uniform authority over the whole country. There is much valuable research already being done on these questions – for instance, in addition to Professor Hudson's book in the Oxford series, the work of Professor George Garnett. As to French, it was used by English lawyers (in a gradually declining dialect known as Law French) until the seventeenth century; but it was not the French of the Normans. It seems to have been adopted in the early days of the common law for argument in court, not in deference to the Normans but because it was a more standardised language than the English dialects of that time and more readily transposed into the Latin of the records.

The AAL Magazine: Professor according to the history of the Inns of Court, they seem to have begun professional training after 15th century. The oldest one among the four is Inner Temple which has a history stems from 12th century onwards. The King's Inn - which still operates in the Republic of Ireland - had commenced its operations during the 15th century when Ireland was under British Dominion. Would you please elaborate on the standards of legal training at the time English justice system evoked from the history?

Prof. Baker: I think the Inns of Court began in the mid-fourteenth century and there is evidence that they had educational functions more or less from the beginning. Although I am a bencher of the Inner Temple, I could not in honesty support a suggestion that it was older than the others. The Inns certainly did not exist in the twelfth century. The Temple existed then, but it was the home of the Knights Templar, not of lawyers. We still have the ancient Temple Church, part of which was consecrated by the Patriarch of Jerusalem in 1185, on whose floor lie stone effigies of knights – including William Marshal, one of the instigators of Magna Carta. But the lawyers came after the order of knights had been dissolved and their possessions given to the Knights Hospitaller of St John, who did not need the Temple for their own use.

Before 1400 each of the four Inns of Court – supported by ten or so lesser inns for younger students – had developed an educational regime based on that of the universities, with lectures (given on statutory texts) and disputations or moots. That system collapsed in the seventeenth century, but it has since been replaced by a modern equivalent. A significant change in legal education occurred in the nineteenth century, when the universities of Cambridge and Oxford – which had always taught Roman law – and also the newer universities began to teach and give degrees in English law. Intending lawyers could then learn the basic principles of English law at university and move on to the more practical aspects of the law after graduation.

The AAL Magazine: Professor, why there is a separate body of Poor Laws developed in England. Why was it required to focus on Poor Law when Britain was relatively a wealthy nation by 15th Century? There may have been a temporary setback but why was it made known as Poor Law.

Prof. Baker: We now call it social security, and the root premise is that some people are not sufficiently fortunate to be able to earn their living by their own efforts or to be supported within a family. How to deal with this problem has been a matter of debate and the subject of various legislative solutions from the sixteenth century to the present. It was not a matter for the common law, because it required the taxation of those who were more fortunate in order to support those unable to work, and this was originally managed at a local level of government – the parish (usually corresponding to a village, or part of a town). The main difficulty, in the sixteenth century as now, was how to make a fair distinction between those who were genuinely incapable of working and those who were simply idle. That calls for political decisions and actions rather than legal reasoning, and I suppose that is why legal historians have not paid it as much attention as perhaps it deserves.

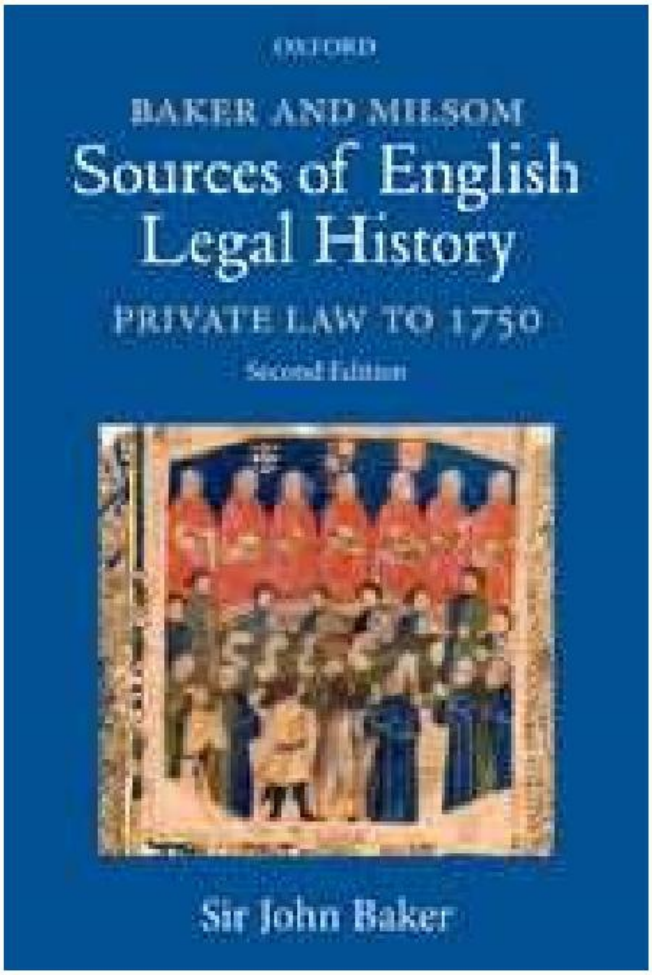
The AAL Magazine: Sir Mathew Hale says legislation of 1598 and 1601 was passed at a time when the problem of poverty was unusually severe. There had been a low productivity of harvest and it was the worst of the period. There had been a steady increase of issues involving unemployment and food supplies which had not kept pace with. Professor why did it take such a dramatic turn to refer to these laws as English Poor Laws. What sort of laws are considered poor law and are they still in force.

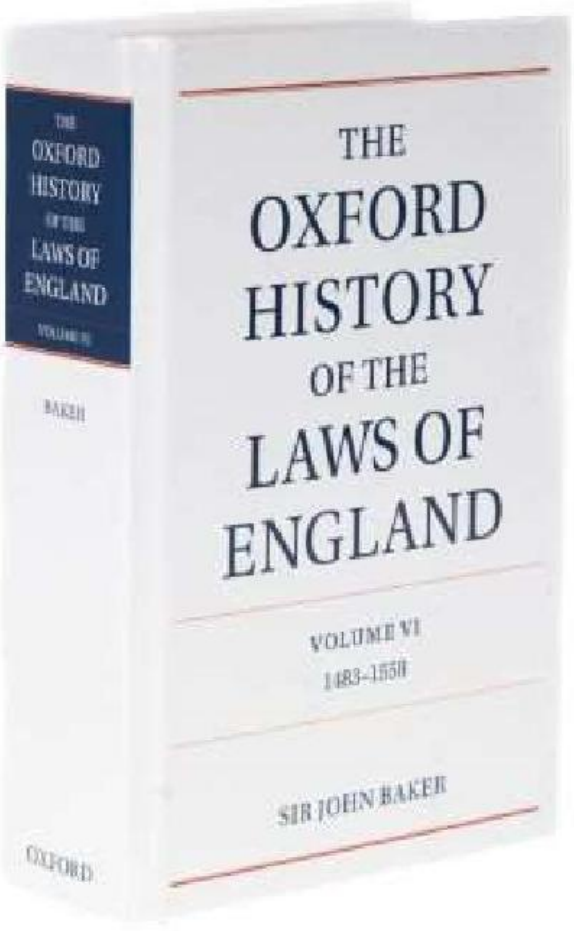
Prof. Baker: I cannot really add to my previous answer. There were poor laws continuously in being from the sixteenth century onwards, but their content was constantly being adapted not only to deal with emergencies such as poor harvests and plagues but also to reflect different theories as to the best remedies for poverty. There was a major overhaul of the poor law in the early nineteenth century with the establishment of 'work-houses', but we now have a more sympathetic approach to social security. As I have indicated, it is not a subject on which I have conducted any research myself.

The AAL Magazine: Professor, prior to your research there have been some research on the History of English Law by Sir William Holdsworth, Sir Frederic

Pollock co-authored with Frederic William Maitland, John Hudson, Harold Potter, Mathew Hale, and yet another one by George Crabb etc. How do you compare your extensive volumes published by the Oxford University Press and what sort of new sources you have discovered during this research?

Prof. Baker: As with the common law, so our understanding of English legal history develops gradually from one generation to another as a result of research and debate. We all build upon what went before. Coke, Hale, Selden and other early writers were interested in legal history chiefly because they thought it directly informed the law of their time. History was not an end in itself, and it did not enter the university curriculum until the later nineteenth century. The Selden Society was named after John Selden (d. 1654) with good reason, though most of us now regard the founder of our subject in its present form to have been Maitland – prime mover of the Selden Society in 1887, and Downing Professor of the Laws of England from 1888 to 1906. Holdsworth's massive history is not so much consulted today, and the reason is that it was only practicable for him to write it from published sources. The principal change in English legal history since the death of Holdsworth in 1944 – four months before I was born – is that we have come to appreciate the fundamental importance of materials beyond the printed law reports and statutes. The principal legal historian of the twentieth century is one you did not mention, Professor S. F. C. Milsom (d. 2016), who had more influence on my work than any other. But it is right to mention also Professor A. W. B. Simpson (d. 2011), another pioneer of the use of manuscripts, and there are several others now living whom I will not embarrass. The purpose of the Oxford History of the Laws of England is to provide the same breadth of coverage as Holdsworth while taking account of subsequent research in a wider range of sources. It is proving a lengthy task, though – it is well over thirty years ago since we decided to undertake it, and only about half is finished. Some of the original authors died before writing anything, and others seem to have been overwhelmed by the task. But it will be finished one day. (Reproduced from our sister Magazine – The Anglo-American Lawyer)


OXFORD
BAKER AND MILSOM
Sources of English Legal History
PRIVATE LAW TO 1750
Second Edition
Sir John Baker


THE OXFORD HISTORY OF THE LAWS OF ENGLAND
BAKER
OXFORD
THE OXFORD HISTORY OF THE LAWS OF ENGLAND
VOLUME VI
1483-1558
SIR JOHN BAKER

Srinath Fernando, JP
LLM (UK) LLM (Colombo)
Editor-In-Chief/ Publisher
KC - The King's Counsel Magazine
is a publication of the
Srinath Fernando Diplomacy

Contact
Srinath Fernando Diplomacy,
Public Affairs Consultants
No. 7/1, 4th Lane,
Rawathawatta,
Moratuwa,
Sri Lanka
Tel 00 94 72 0622 482
00 94 11 2648272
Email; kcthekingscounsel@gmail.com

CITATION
KC - The Kg's Cnsl Vol. 3,
No. 1 (Interview Series) March 2024

ISSN 2950-6794

9 772950 679001